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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. _____

DAVID LEE MERIDA,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTIONS PRESENTED

I.

WHETHER THE "MAIN APPLICATION" OF THE JURY INSTRUCTION ON ATTEMPTED MURDER WAS CALCULATED TO DENY PETITIONER DUE PROCESS OF LAW IN VIOLATION OF U.S.C.A. CONST. AMEND. FOURTEEN, WHEREIN IT FAILED TO INSTRUCT THE JURY THAT THE STATE MUST PROVE, IF RAISED, THE PETITIONER WAS NOT ACTING UNDER THE IMMEDIATE INFLUENCE OF A SUDDEN PASSION ARISING FROM AN ADEQUATE CAUSE BEFORE THEY COULD CONVICT OF ATTEMPTED MURDER.

II.

WHETHER THE "MAIN APPLICATION" OF THE JURY INSTRUCTION ON ATTEMPTED VOLUNTARY MANSLAUGHTER WAS CALCULATED TO DENY PETITIONER DUE PROCESS OF LAW IN VIOLATION OF U.S.C.A. CONST. AMEND. FOURTEEN, WHEREIN IT FAILED TO INSTRUCT THE JURY WHO HAD THE BURDEN OF PERSUASION RELATING TO WHETHER PETITIONER WAS ACTING UNDER THE IMMEDIATE INFLUENCE OF SUDDEN PASSION ARISING FROM AN ADEQUATE CAUSE BEFORE THEY COULD CONVICT OF ATTEMPTED VOLUNTARY MANSLAUGHTER.

III.

WHETHER THE FAILURE OF THE "MAIN APPLICATIONS" ON "ATTEMPTED MURDER" AND "ATTEMPTED VOLUNTARY MANSLAUGHTER" TO MUSTER UP TO DUE PROCESS STANDARDS SO INFECTED THE INSTRUCTIONS THAT THERE EXISTS A DECIDED LIKELIHOOD THAT THE JURY AFFIRMATIVELY ANSWERED THE "ATTEMPTED VOLUNTARY MANSLAUGHTER" PARAGRAPH NEVER HAVING CONSIDERED AGGRAVATED ASSAULT, WHICH WAS CORRUPTED BY "PLAIN ERROR" AS IT CHARGED ON AN ELEMENT OUTSIDE THE SCOPE OF THE INDICTMENT.

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THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of Texas, entered on February 21, 1983, rehearing denied on March 1, 1983.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at ____S.W.2d____, No. 10-1982, dated February 2, 1983, and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1237(3), petitioner having asserted below and asserts here the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following provisions of Texas law:

Texas Penal Code, Sec. 19.02;

(a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual.

Texas Penal Code, Sec. 15.01;

(a) A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended.

Texas Penal Code, Sec. 19.04;

(b) "Sudden passion" means passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation.

(c) "Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind capable of cool reflection.

Texas Penal Code, Sec. 22.01(a)(1);

(a) A person commits an offense if he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another, including his spouse; or

Texas Penal Code, Sec. 22.02(a)(1);

(a) A person commits an offense if he commits assault as defined in Section 22.01 of this code and he:

(1) causes serious bodily injury to another, including his spouse.

STATEMENT

Petitioner was convicted of attempted voluntary manslaughter upon an indictment claiming attempted murder.

A jury, after finding petitioner guilty, assessed his punishment at five (5) years penal servitude.

Upon appeal to the Court of Appeals, Tenth Supreme Judicial District, Waco, Texas, petitioner's conviction was upheld and affirmed.

A timely Petition for Discretionary Review to the Texas Court of Criminal Appeals was filed. An opinion was rendered affirming the lower court, which is set out in Appendix "A", *infra.* A Motion for Leave to File Motion

to Rehear Petition for Discretionary Review to the Texas Court of Criminal Appeals was filed and refused on March 1, 1983. No opinion was rendered.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON BELOW

No substantial Federal question was presented on direct appeal to the Tenth Court of Appeals.

On Petition for Discretionary Review, with different counsel, no substantial Federal question was presented.

On Motion to Rehear the Petition for Discretionary Review the Federal questions presented herein were rejected without opinion.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE "MAIN APPLICATIONS" OF THE JURY INSTRUCTIONS ON "ATTEMPTED MURDER" AND "ATTEMPTED VOLUNTARY MANSLAUGHTER", WHICH WERE IN VIOLATION OF FOURTEENTH AMENDMENT DUE PROCESS STANDARDS, SO INFECTED THE ENTIRE INSTRUCTION THAT THERE EXISTED A DECIDED LIKELIHOOD THAT THE JURY AFFIRMATIVELY ANSWERED THE "ATTEMPTED VOLUNTARY MURDER" PARAGRAPH NEVER HAVING CONSIDERED AGGRAVATED ASSAULT, WHICH WAS CORRUPTED BY "PLAIN ERROR" AS IT CHARGED ON AN ELEMENT OUT OF THE SCOPE OF THE INDICTMENT.

Petitioner was charged with attempted murder thusly: "attempt to cause the death of MICHAEL MEADOWS,

hereafter styled the complainant, by intentionally shooting the complainant with a gun, having intent to commit murder."[1]

The jury instruction is attached as Appendix B.

It is clear that the instruction on attempted murder failed to require the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation when the issue was properly presented in this cause. *Mullaney v. Wilbur*, 95 S.Ct. 1881 (1975).

The lesser instruction on attempted voluntary manslaughter did not solve the issue. It was, at best, more than ambiguous on which party had the burden of persuasion on heat of passion and sudden provocation.

Because the attempted murder instruction was constitutionally infirm, the attempted voluntary murder instruction has no merit for the reason the two are inexorably linked and neither required the State to shoulder the burden of proving the absence of the issue in question.

Under Texas law, had the jury convicted petitioner of the offense of aggravated assault, the case would have been reversed as the instruction was unauthorized by expanding upon the culpable mental states, which are elements of the crime, from the indictment, as drawn, to the instruction. *Young v. State*, 605 S.W.2d 550 (Tex. Cr. App. 1980); *Garcia v. State*, 574 S.W.2d 133 (Tex. Cr. App. 1978); *Fella v. State*, 573 S.W.2d 548 (Tex. Cr. App. 1978).

The law is clear that the trial judge may not alter the indictment in his instructions. It is error to broaden the indictment by charging on elements or offenses not cov-

1. V.T.C.A. Penal Code, §§ 19.02(a)(1) and 15.01(a).

ered by the indictment. *United States v. Carlson,* 616 F.2d 446 (9th Cir. 1980); *United States v. Salinas,* 654 F.2d 319 (9th Cir. 1981); *United States v. Marolda,* 615 F.2d 867 (9th Cir. 1980).

It appears that the failure of the instructions on "attempted murder" and "attempted voluntary manslaughter" to pass constitutional muster corrupted the entire instruction, caused the jury to answer affirmatively the attempted voluntary manslaughter paragraph never having considered the aggravated assault instruction which was infected by "plain error", and left petitioner with three instructions none of which would support a verdict or comport with due process.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATION

I, KEN J. McLEAN, hereby certify that a true and correct copy of this Petition was mailed, postage prepaid, to Hon. Jim Mattox, Attorney General of Texas, Supreme Court Building, Austin, Texas 78711 on this the_____ day of April, 1983.

_____

KEN J. MCLEAN

APPENDIX "A"

NO. 1019-82

DAVID LEE MERIDA, Appellant,

v.

THE STATE OF TEXAS, Appellee.

Petition for Discretionary Review from the Court of Appeals, Tenth Supreme Judicial District of Texas (HARRIS County)

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Appeal is taken from a conviction for attempted voluntary manslaughter. After finding Appellant guilty, the jury assessed punishment at five years. Appellant's conviction was affirmed in an unpublished opinion by the Court of Appeals.

In his petition for discretionary review, Appellant urges that the court's charge to the jury is fundamentally defective for authorizing a conviction for an offense which does not exist. Specifically, Appellant argues that the offense of attempted voluntary manslaughter "is nonexistent in Texas law." This contention was not presented to the Court of Appeals.

The record reflects that Appellant was originally indicted for the offense of attempted murder. Evidence at trial raised the issue that Appellant acted under the immediate influence of sudden passion arising from an adequate cause.

In Ex parte Buggs, ____S.W.2d____ (No. 69,070, delivered 02/02/83), this Court addressed a contention identical to that now presented. There, it was held:

> "It follows that when an indictment alleges *attempted* murder under Sec. 19.02(a)(1) and 15.01(a), but there is evidence that the accused acted under the immediate influence of sudden passion arising from an adequate cause, as defined by Sec. 19.04(b) and (c), then *attempted* voluntary manslaughter becomes an issue in the case. The intent to commit the substantive offense of murder remains an element of attempted voluntary manslaughter, but the attempt to cause death is generated by immediate influence of sudden passion caused by provocation from the intended victim. Accordingly, we hold that inappropriate facts and circumstances, attempted voluntary manslaughter constitutes a penal offense when it becomes a lesser included offense of attempted murder."

We find that Appellant's contention is controlled by our opinion in Ex parte Buggs, *supra,* and is therefore, without merit. Likewise, the second contention presented in Appellant's petition for discretionary review is without merit. See Garrett v. State, ____S.W.2d____ (No. 031-82, delivered 11/10/82).

Appellant's petition for discretionary review is refused.

PER CURIAM

En banc

Delivered February 2, 1983

DO NOT PUBLISH

Teague, J. Not Participating

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas

MARCH 1, 1983

I have been instructed to advise that the Court has this day DENIED APPELLANT'S MOTION FOR REHEARING ON the APPELLANT'S petition for discretionary review in Cause No. 1019-82, DAVID LEE MERIDA 10-81-135-CR.

Sincerely yours,

THOMAS LOWE, Clerk

APPENDIX "B"

CAUSE NO. 279,241

IN THE 232ND DISTRICT COURT
OF HARRIS COUNTY, TEXAS
MAY TERM, A.D., 1980

THE STATE OF TEXAS

v.

DAVID LEE MERIDA

MEMBERS OF THE JURY:

The defendant, DAVID LEE MERIDA, stands charged by indictment with the offense of having attempted to commit murder, alleged to have been committed in Harris County, Texas, on or about the 22nd day of April, 1978. The defendant has pleaded "Not Guilty".

Our law provides that a person commits murder if he intentionally or knowingly causes the death of an individual, or intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual.

A person commits voluntary manslaughter if he intentionally or knowingly causes the death of an individual or if he intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual, except that he caused the death under the immediate influence of sudden passion arising from an adequate cause.

"Sudden passion" means passion directly caused by and arising out of provocation by the individual killed

or another acting with the person killed, which passion arises at the time of the offense and is not solely the result of former provocation.

"Adequate cause" means cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection.

A person commits an offense if, with specific intent to commit an offense, he does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended. So, a person commits the offense of attempted murder if, with specific intent to unlawfully cause the death of another, he does some act amounting to more than mere preparation to commit murder that tends, but fails to effect the commission of such offense.

A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

"Bodily injury" means physical pain, illness, or any impairment of physical condition. "Serious bodily injury" means bodily injury that creates substantial risk of death or that causes death, serious permanent disfigurement,

or protracted loss or impairment of the function of any bodily member or organ.

A "deadly weapon" means a firearm or anything manifestly designed, made, or adapted for the purpose of inflicting death or serious bodily injury or anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

Now, if you find from the evidence beyond a reasonable doubt that on or about the 22nd day of April, 1978, in Harris County, Texas, the defendant, DAVID LEE MERIDA, did, with the intent to kill KENNETH MICHAEL MEADOWS, intentionally attempt to kill the said KENNETH MICHAEL MEADOWS by shooting him with a firearm, to-wit, a gun, as set forth in the indictment, then you will find the defendant guilty of an attempt to commit murder.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of attempted murder and consider whether he is guilty of the lesser offense of attempt to commit voluntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the 22nd day of April, 1978, in Harris County, Texas, the defendant, DAVID LEE MERIDA, did, with intent to kill the said KENNETH MICHAEL MEADOWS, intentionally attempt to kill the said KENNETH MICHAEL MEADOWS by shooting him with a firearm, to-wit, a gun, but you further find and believe from all the facts and circumstances in evidence in the case, the defendant, in attempting to kill the said KENNETH MICHAEL MEADOWS, if he did, acted under the immediate influence of sudden passion

arising from an adequate cause, as those terms have been defined, or if you have a reasonable doubt as to whether or not the defendant acted under the immediate influence of sudden passion arising from an adequate cause, then you will find the defendant guilty of an attempt to commit voluntary manslaughter.

You are instructed that you may consider all relevant facts and circumstances surrounding the alleged attempted killing, if any, and the previous relationship existing between the accused and KENNETH MICHAEL MEADOWS, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense, if any.

You are instructed that a specific intent to kill is an essential element of the offense of attempt to commit murder, and unless you find from the evidence beyond a reasonable doubt that at the time the defendant shot KENNETH MICHAEL MEADOWS, if he did, the defendant had the specific intent then and there to intentionally cause the death of the said KENNETH MICHAEL MEADOWS, or if you have a reasonable doubt as to whether he had the specific intent to so cause the death of the said KENNETH MICHAEL MEADOWS, you cannot convict the defendant of either attempted murder or attempted voluntary manslaughter. In such event, you will acquit the defendant of attempted murder and attempted voluntary manslaughter and consider whether or not the defendant is guilty of aggravated assault.

A person commits an assault if he intentionally, knowingly, or recklessly causes bodily injury to another person. Such an assault is aggravated assault if it causes serious

bodily injury to another or if the person committing assault uses a deadly weapon.

A person acts "recklessly", or is "reckless", with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the standpoint of the person charged.

Now, if you find and believe from the evidence beyond a reasonable doubt that on the occasion in question the defendant, DAVID LEE MERIDA, did intentionally, or knowingly, or recklessly cause bodily injury to KENNETH MICHAEL MEADOWS by shooting him with a deadly weapon, to-wit, a gun, but you further find from the evidence or you have a reasonable doubt thereof, that the defendant did not intend to kill the said KENNETH MICHAEL MEADOWS, then you will find the defendant guilty of aggravated assault; or, if at the time and place aforesaid, you find from the evidence beyond a reasonable doubt that the defendant made an assault upon KENNETH MICHAEL MEADOWS by shooting him with said gun and inflicted upon him serious bodily injury, but you further find from the evidence that the defendant did not intend to kill the said KENNETH MICHAEL MEADOWS, or if you have a reasonable doubt as to such intent, then you will find the defendant guilty of an aggravated assault.

Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of aggravated assault.

If you find from the evidence beyond a reasonable doubt that the defendant is guilty of attempt to commit murder or attempt to commit voluntary manslaughter, but you have a reasonable doubt as to which of said offenses he is guilty, then you should resolve that doubt in defendant's favor and, in such event, find him guilty of the lesser offense of attempt to commit voluntary manslaughter.

If you should find from the evidence beyond a reasonable doubt that the defendant is either guilty of an attempt to commit some kind of criminal homicide, that is, attempted murder or attempted voluntary manslaughter on the one hand, or of aggravated assault on the other hand, but you have a reasonable doubt as to which the defendant is guilty, then you should resolve that doubt in defendant's favor, and in such event, find him guilty of aggravated assault only.

If you have a reasonable doubt as to whether the defendant is guilty of attempted murder, attempted voluntary manslaughter, or aggravated assault, or any offense defined in this charge, you should acquit the defendant, and say "Not Guilty."

Upon the law of self-defense, you are instructed that a person is justified in using force against another when and to the degree he reasonably believes the force is immediately necessary to protect himself against the other person's use or attempted use of unlawful force.

A person is justified in using deadly force against another if he would be justified in using force against the other in the first place, as above set out, and when he reasonably believes that such force is immediately neces-

sary to protect himself against the other person's use or attempted use of unlawful deadly force, and if a reasonable person in the defendant's situation would not have retreated.

By the term "deadly force" is meant force that is intended or known by the person using it to cause, or in the manner of its use or intended use to be capable of causing, death or serious bodily injury.

"Bodily injury" is physical pain, illness, or any impairment of physical condition. "Serious bodily injury" is bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

By the term "reasonable belief", as herein used, is meant a belief that would be held by an ordinary and prudent person in the same circumstances as the defendant.

When a person is attacked with unlawful deadly force, or he reasonably believes he is under attack or attempted attack with unlawful deadly force and there is created in the mind of such a person a reasonable expectation or fear of death or serious bodily injury, then the law excuses or justifies that person in resorting to deadly force by any means at his command to the degree that he reasonably believes immediately necessary, viewed from his standpoint at the time, to protect himself from such attack or attempted attack. It is not necessary that there be an actual attack or attempted attack, as a person has a right to defend his life and person from apparent danger as fully and to the same extent as he would had the danger

been real, provided that he, upon a reasonable apprehension of danger, as it appeared to him from his standpoint at the time, and that he reasonably believed such force was immediately necessary to protect himself against the other person's use or attempted use of unlaw deadly force.

You are instructed that in determining the existence of real or apparent danger, it is your duty to consider all of the facts and circumstances in the case in evidence before you consider the words, acts, and conduct, if any, of KENNETH MICHAEL MEADOWS at the time of and prior to the time of the alleged killing and consider whatever threats, if any, the said KENNETH MICHAEL MEADOWS may have made to the defendant, and consider any difficulty or difficulties which the said KENNETH MICHAEL MEADOWS had had with the defendant, and in considering such circumstances, you should place yourselves in the defendant's position at that time and view them from his standpoint alone.

Now, if you find from the evidence beyond a reasonable doubt that the defendant, DAVID LEE MERIDA, did shoot KENNETH MICHAEL MEADOWS with a gun as alleged, but you further find from the evidence that, viewed from the standpoint of the defendant at the time, from the words or conduct, or both, of KENNETH MICHAEL MEADOWS, it reasonably appeared to him that his life or person was in danger and there was created in his mind a reasonable expectation or fear of death or serious bodily injury from the use of unlawful deadly force at the hands of KENNETH MICHAEL MEADOWS, and that acting under such apprehension and reasonable belief that the use of deadly force on his part

was immediately necessary to protect himself against KENNETH MICHAEL MEADOWS' use or attempted use of unlawful deadly force, he shot the said KENNETH MICHAEL MEADOWS, and that a reasonable person in the defendant's situation would not have retreated, then you should acquit the defendant on the grounds of self-defense; or if you have a reasonable doubt as to whether or not the defendant was acting in self-defense on said occasion and under the circumstances, then you should give the benefit of that doubt to the defendant and acquit him, and say by your verdict "Not Guilty".

If you find from the evidence beyond a reasonable doubt that at the time and place in question the defendant did not reasonably believe that he was in danger of death or serious bodily injury, or that a reasonable person in the defendant's situation, at the time and place in question, would have retreated before using deadly force against KENNETH MICHAEL MEADOWS, or that the defendant, under the circumstances, did not reasonably believe that the degree of force actually used by him was immediately necessary to protect himself against KENNETH MICHAEL MEADOWS' use or attempted use of unlawful deadly force, then you must find against the defendant on the issue of self-defense.

You are instructed that the Grand Jury indictment is not evidence of guilt. It is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence, nor can it be considered by you in passing upon the innocence or guilt of this defendant.

During your deliberations in this case, you must not consider, discuss, or relate any matters not in evidence before you. You should not consider or mention any per-

sonal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you have retired to your jury room, you should select one of your members as your Foreman or Forelady. It is his or her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by signing the same as Foreman or Forelady.

You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the Court which is herein given to you and be governed thereby.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

In all criminal cases, the burden of proof is on the State, and the defendant is presumed to be innocent until the defendant's guilt is established by legal evidence beyond a reasonable doubt; and, in case you have a reasonable doubt of the defendant's guilt, you will acquit the defendant and say by your verdict "Not Guilty".

/s/ J. D. GUYON
J. D. Guyon, Judge
232nd District Court
Harris County, Texas